

§ 230.438

may dispense with the requirement for the registrant to file the written consent of Arthur Andersen LLP (or a foreign affiliate of Arthur Andersen LLP) as required by Section 7 of the Act (15 U.S.C. 77g) where:

(1) The registrant has not already obtained the written consent that would be required if not for this section;

(2) The registrant is not able to obtain the written consent after reasonable efforts; and

(3) The registrant discloses clearly any limitations on recovery by investors posed by the lack of consent.

[67 FR 13537, Mar. 22, 2002]

§ 230.438 Consents of persons about to become directors.

If any person who has not signed the registration statement is named therein as about to become a director, the written consent of such person shall be filed with the registration statement. Any such consent, however, may be omitted if there is filed with the registration statement a statement by the registrant, supported by an affidavit or affidavits, setting forth the reasons for such omission and establishing that the obtaining of such consent is impracticable or involves undue hardship on the registrant.

[Reg. C, 12 FR 4074, June 24, 1947]

§ 230.439 Consent to use of material incorporated by reference.

(a) If the Act or the rules and regulations of the Commission require the filing of a written consent to the use of any material in connection with the registration statement, such consent shall be filed as an exhibit to the registration statement even though the material is incorporated therein by reference. Where the filing of a written consent is required with respect to material incorporated in the registration statement by reference, which is to be filed subsequent to the effective date of the registration statement, such consent shall be filed as an amendment to the registration statement no later than the date on which such material is filed with the Commission, unless express consent to incorporation by reference is contained in the material to be incorporated by reference.

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(b) Notwithstanding paragraph (a) of this section, any required consent may be incorporated by reference into a registration statement filed pursuant to Rule 462(b) under the Act (§ 230.462(b)) from a previously filed registration statement relating to that offering, provided that, the consent contained in the previously filed registration statement expressly provides for such incorporation.

[47 FR 11441, Mar. 16, 1982, as amended at 60 FR 26615, 26617, May 17, 1995]

§§ 230.445–230.447 [Reserved]

FILINGS; FEES; EFFECTIVE DATE

§ 230.455 Place of filing.

All registration statements and other papers filed with the Commission shall be filed at its principal office, except for statements of Form SB-1 (§ 239.9 of this chapter) and Form SB-2 (§ 239.10 of this chapter). Registration statements on Form SB-1 or SB-2 may be filed with the Commission either at its principal office or at the Commission's regional or district offices as specified in General Instruction A to each of those forms, except that registration statements and post-effective amendments thereto on such forms that are filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)) shall be filed at the Commission's principal office. Such material may be filed by delivery to the Commission through the mails or otherwise; provided, however, that only registration statements and post-effective amendments thereto filed pursuant to Rule 462(b) (§ 230.462(b)) and Rule 110(d) (§ 230.110(d)) may be filed by means of facsimile transmission.

[58 FR 65542, Dec. 15, 1993, as amended at 60 FR 26617, May 17, 1995]

§ 230.456 Date of filing.

The date on which any papers are actually received by the Commission shall be the date of filing thereof, if all the requirements of the act and the rules with respect to such filing have been complied with and the required fee paid. The failure to pay an insignificant amount of the required fee at the time of filing, as the result of a

bona fide error, shall not be deemed to affect the date of filing.

[16 FR 8737, Aug. 29, 1951]

§ 230.457 Computation of fee.

(a) If a filing fee based on a bona fide estimate of the maximum offering price, computed in accordance with this rule where applicable, has been paid, no additional filing fee shall be required as a result of changes in the proposed offering price. If the number of shares or other units of securities, or the principal amount of debt securities to be offered is increased by an amendment filed prior to the effective date of the registration statement, an additional filing fee, computed on the basis of the offering price of the additional securities, shall be paid. There will be no refund once the statement is filed.

(b) A required fee shall be reduced in an amount equal to any fee paid with respect to such transaction pursuant to sections 13(e) and 14(g) of the Securities Exchange Act of 1934 or any applicable provision of this section; the fee requirements under sections 13(e) and 14(g) shall be reduced in an amount equal to the fee paid the Commission with respect to a transaction under this section. No part of a filing fee is refundable.

(c) Where securities are to be offered at prices computed upon the basis of fluctuating market prices, the registration fee is to be calculated upon the basis of the price of securities of the same class, as follows: either the average of the high and low prices reported in the consolidated reporting system (for exchange traded securities and last sale reported over-the-counter securities) or the average of the bid and asked price (for other over-the-counter securities) as of a specified date within 5 business days prior to the date of filing the registration statement.

(d) Where securities are to be offered at varying prices based upon fluctuating values of underlying assets, the registration fee is to be calculated upon the basis of the market value of such assets as of a specified date within fifteen days prior to the date of filing, in accordance with the method to be used in calculating the daily offering price.

(e) Where securities are to be offered to existing security holders and the portion, if any, not taken by such security holders is to be reoffered to the general public, the registration fee is to be calculated upon the basis of the proposed offering price to such security holders or the proposed reoffering price to the general public, whichever is higher.

(f) Where securities are to be offered in exchange for other securities (except where such exchange results from the exercise of a conversion privilege) or in a reclassification or recapitalization which involves the substitution of a security for another security, a merger, a consolidation, or a similar plan of acquisition, the registration fee is to be calculated as follows:

(1) Upon the basis of the market value of the securities to be received by the registrant or canceled in the exchange or transaction as established by the price of securities of the same class, as determined in accordance with paragraph (c) of this section.

(2) If there is no market for the securities to be received by the registrant or cancelled in the exchange or transaction, the book value of such securities computed as of the latest practicable date prior to the date of filing the registration statement shall be used, unless the issuer of such securities is in bankruptcy or receivership, or has an accumulated capital deficit, in which case one-third of the principal amount, par value or stated value of such securities shall be used.

(3) If any cash is to be received by the registrant in connection with the exchange or transaction, the amount thereof shall be added to the value of the securities to be received by the registrant or cancelled as computed in accordance with (e) (1) or (2) of this section. If any cash is to be paid by the registrant in connection with the exchange or transaction, the amount thereof shall be deducted from the value of the securities to be received by the registrant in exchange as computed in accordance with (e) (1) or (2) of this section.

(4) Securities to be offered directly or indirectly for certificates of deposit